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In the Supreme Court of the United States

OCTOBER TERM, 1977

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the court of appeals (App. 26–36) is reported at 539 F. 2d 1256. The district court's opinion (App. 10–25) is not officially reported but is unofficially reported at 10 FEP Cases 844, 9 EPD ¶10,205.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1976, and a petition for rehearing and suggestion for rehearing *en banc* was denied on August 19, 1976. The petition for a writ of certiorari was filed on November 15, 1976, and was granted on

February 22, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly tolled the running of the 180-day time limit on the notice of intent to sue required by Section 7(d) of the Age Discrimination in Employment Act where the lodging of an oral complaint with the Secretary of Labor achieved substantial and timely compliance with the purpose of the notice requirement.

2. Whether when interpreted in light of its legislative purpose the notice requirement of Section 7(d) is satisfied when an aggrieved person lodges a timely complaint of age discrimination that does not explicitly refer to an intent to file suit.

STATUTE INVOLVED

Section 7(d) of the Age Discrimination in Employment Act of 1967, 81 Stat. 604, as amended, 29 U.S.C. 626(d), provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

INTEREST OF THE UNITED STATES

Congress has conferred upon the Secretary of Labor part of the responsibility to effectuate the purpose of the Age Discrimination in Employment Act ("ADEA" or "Act") to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (29 U.S.C. 621(b)). The Department of Labor is charged with investigating complaints of age discrimination in employment and attempting to eliminate "through informal methods of conciliation, conference, and persuasion" practices that violate the Act (29 U.S.C. 626(a) and (b)). Should the Secretary fail to achieve voluntary compliance, he is empowered to bring suit in federal district court for such relief as may be appropriate (29 U.S.C. 626(b)).

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Congress also provided in the ADEA for private actions by "[a]ny person aggrieved" by age discrimination in employment (29 U.S.C. 626(c)). The effectiveness of the private enforcement alternative is of crucial importance to the Secretary due to the magnitude of the Act's coverage[1] and a rapidly increasing number of age discrimination complaints.[2] For example, while the Secretary of Labor received 5,121 complaints and filed 47 suits during calendar year 1976, in the same one-year period more than 300 private enforcement actions were filed in the federal district courts.[3] In addition, by providing an effective alternative to suit by the Secretary, private enforcement actions free the Secretary to devote the limited public resources that have been made

[1] The ADEA is applicable to all personnel actions of any employer, with 20 or more employees, in any industry affecting interstate commerce. It applies also to recruiting, advertising and referrals by employment agencies serving covered employers, and to specified actions by unions that have 25 or more members and represent or seek to represent the employees of such employers. 29 U.S.C. 623 and (Supp. V) 630. The Act protects all individuals who are at least 40 years of age but less than 65 years of age. 29 U.S.C. 631.

[2] Complaints filed with the Secretary of Labor in fiscal years 1972, 1973, 1974, 1975, and 1976 numbered, respectively, 1862, 2208, 3040, 4717, 5121. United States Department of Labor, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1976*, p. 8 (1977) ("*Age Discrimination Report*").

[3] *Age Discrimination Report*, *supra*, at p. 19. In the first six months of calendar year 1977, the Secretary filed 26 suits under the Act as compared to more than 200 suits by aggrieved individuals. See 2 *Title VII Monitor*, Nos. 3–8 (March–August 1977) (Want Publishing Co., Washington, D.C.).

available (see 29 U.S.C. (Supp. V) 634) to cases of significant precedential value and to those arising out of company-wide patterns and practices. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211.

Procedural problems have severely reduced the efficacy of private enforcement actions; approximately half of all reported private actions under the ADEA have been dismissed at least in part on procedural grounds. The notice requirement in Section 7(d) is the most common basis for dismissal;[4] judicial construction of that Section has frustrated achievement of the purposes of the ADEA in a significant number of cases. *E.g.*, *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247 (C.A. 6); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (C.A. 5). The United States therefore has a substantial interest in the instant case, in which this Court examines the Act's notice requirement for the first time.

STATEMENT[5]

1. On July 31, 1973, petitioner's Credit Card Center in Tulsa, Oklahoma, discharged respondent, then 51

[4] *Age Discrimination Report*, *supra*, at p. 22.

[5] Petitioner's statement of facts (Br. 3–8) repeatedly relies on an affidavit filed in the court of appeals by Kenneth Jacobs, its Manager of Employee Relations (see App. 81–83). The affidavit purports to supplement testimony given by Mr. Jacobs during the hearing in the district court on petitioner's motion to dismiss the suit (see App. 49–50). It presents statements which conflict in several respects with testimony also given in the district court hearing by J. Dean Speer, the Assistant Area Director of the

years of age, from her employment (App. 11). Believing that her discharge was prompted by her age, respondent promptly consulted a local attorney, who told her that it was unnecessary to retain counsel to challenge her discharge, and that she should instead complain to the Wage and Hour Division of the Department of Labor (App. 27).[6] Following that advice, she met with J. Dean Speer, the Department's Assistant Area Director for Wage-Hour in Tulsa on August 9, nine days after the discharge (App. 11, 27).[7] Speer interviewed her and filled out a complaint form indicating the substance of her charge of age discrimination (App. 27; Tr. 116).[8] He told her that the complaint

Wage and Hour Division of the Department of Labor (See App. 53–67). Neither that affidavit nor one similarly filed by Warren D. Landis, Acting Administrator of the Wage and Hour Division (see App. 76–80), were before the district court or part of the record on appeal. We doubt that these affidavits are properly before the Court and we accordingly omit reference to them.

[6] Petitioner states (Br. 3–4) that respondent contacted two attorneys prior to going to the Department. But the testimony to which petitioner refers (App. 48), as well as other portions of the record, indicate that respondent "called a friend, [not said to be an attorney,] who referred [her] to an attorney" belonging to the same women's club as she (App. 49, also 42).

[7] The district court's finding reads "September 9, 1974," but this is an apparent transcription error as appears from the term "shortly after her termination" in the same sentence (App. 11). The court of appeals states that the meeting was on August 9 (App. 27; also 50, 53).

[8] "Tr." refers to the transcript of the hearing in the district court. In a portion of the transcript not reproduced in the Appendix, Mr. Speer testified that he "did question [respondent] about the facts of the case * * * [and] did fill out [the Department's] internal form indicating the substance of her complaint" (Tr. 116).

would be investigated and that it might take a year (App. 12, 27). He did not tell her that she had a right to maintain a private law suit under the Act (App. 12).

On the same day, Speer informed petitioner by telephone that respondent had filed a complaint charging age discrimination in violation of the ADEA (App. 27, 63). Shortly thereafter Speer began a series of conciliation conferences with petitioner's manager of employee relations (App. 27–28, 50, 59, 63). These efforts were unsuccessful (App. 28, 55, 56), and Speer assumed "an investigative posture" (App. 28, 54) in order "to make a determination as to whether or not, in [his] opinion, [respondent] had suffered discrimination on the basis of age" (App. 56). In November 1973 petitioner agreed to prepare and submit internal studies and statistical information relating to various aspects of its employment practices (App. 28, 55, 56).

While these proceedings were pending, respondent repeatedly made telephone inquiries to the Wage-Hour office concerning the progress of her case and on each occasion was told that she would be notified of any action taken (App. 12). On March 5, 1974, Speer notified respondent by letter that there would be further delay in completing the investigation since he had not received the statistical information promised by petitioner, but that she was entitled to file a private suit (App. 12, 28, 69). The letter noted that there were time limits governing the filing of such

suits, and it called attention to page 4 of an accompanying pamphlet, which discussed the Section 7(d) notice provision (App. 68, 74). The letter was sent on the 217th day after the alleged discrimination had occurred.

Upon receiving the Department's notification, respondent promptly retained counsel, who, within nine days of the date of Speer's letter, mailed a formal notice to the Department of Labor that his client intended to file a private suit against petitioner (App. 7, 12). Speer thereafter renewed his conciliation efforts, again without success, and on May 16, 1974, he notified respondent's counsel that conciliation had failed (App. 28, 55). On May 21, 1974, respondent filed the instant suit in the United States District Court for the Northern District of Oklahoma (App. 1).

2. On February 6, 1975, the district court entered an order dismissing the present action on the ground that respondent had not complied with Section 7(d)(1) of the ADEA, 29 U.S.C. 626(d)(1), which requires that a "notice of intent to sue" under the Act "be filed * * * within [180] days after the alleged unlawful practice occurred." The court held that the notice-to-sue provision creates an absolute jurisdictional prerequisite to the maintenance of private enforcement actions and that the time requirement must be strictly enforced regardless of any equitable considerations (App. 10-25). The court of appeals reversed (App. 26–36), holding that it could "not

fault [respondent] in her efforts to present her cause" and since petitioner was not prejudiced "either presumptively or in fact" by the lateness of respondent's filing of a notice of intent to sue with the Secretary, proper regard for the objectives of the Act required equitable tolling of the period for filing from the time of the lodging of respondent's complaint with the Secretary and consideration of the case on its merits (App. 36).

SUMMARY OF ARGUMENT

I

The Age Discrimination in Employment Act (ADEA) was adopted in 1967 as an extension of the policy against employment discrimination embodied in Title VII of the Civil Rights Act of 1964. Congress intended in the ADEA to simplify the procedures utilized in Title VII to permit speedy enforcement through court suits by aggrieved individuals or the Secretary of Labor. It was hoped that these streamlined procedures would avoid the procedural stumbling blocks encountered by Title VII plaintiffs which are "always unfortunate, but particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967). While age discrimination plaintiffs need not obtain any right-to-sue letter, the Secretary of Labor is required to attempt to eliminate any unlawful practice "by informal methods of conciliation, conference, and persuasion" before suit is initiated by either a private individual or the Secretary himself. 29 U.S.C. 626(b) and (d). To guarantee his oppor-

tunity to conciliate, private plaintiffs must afford the Department of Labor 60 days' "notice of intent to sue." Section 7(d)(1 of the Act provides that the notice "shall be filed * * * within one hundred eighty days after the alleged unlawful employment practice occurred." 29 U.S.C. 626(d)(1). Petitioner's principal argument is that this 180-day period is an inflexible time limit that cannot be tolled under principles generally applicable to statutes of limitations.

A. In determining whether tolling is permissible "the proper test is * * * whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 557–558; *Burnett* v. *New York Central Railroad Co.,* 380 U.S. 424, 427. The purpose of the Section 7(d) notice requirement is to "allow time for the Secretary to mediate the grievance." S. Rep. No. 723, 90th Cong., 1st Sess. p. 5 (1967). The notice triggers the Secretary's responsibility to initiate conciliation under Section 7(d) at a time when voluntary settlement is not inhibited by the hardening of positions and by the accumulation of large claims for back pay.

These statutory objectives were fully satisfied here by respondent's prompt filing of a claim with the Department of Labor within nine days of the alleged discrimination. The Department promptly notified petitioner of the nature of the claim and as required by Section 7(b) initiated "informal methods of conciliation, conference, and persuasion" identical in nature to that triggered by the notice of intent to sue under Section 7(d). The Secretary of Labor had a full

opportunity to carry out his conciliation responsibilities under the Act, and the employer had full and timely notice of what he needed to know in the event that settlement out of court should fail and suit be initiated by either the private individual or the Department of Labor. No further benefit would have accrued to either the employer, the Secretary, or the public had the original complaint explicitly indicated an intent to sue. This is accordingly a case in which "the congressional purpose is effectuated by tolling the statute of limitations" *Burnett* v. *New York Central Railroad Co., supra,* 380 U.S. at 427.

B. The language and history of the Act contain no indication that Congress intended to preclude absolutely the claims of elderly employees whose notices failed to meet the time requirements of Section 7(d). The timing requirement is stated in the familiar terminology of statutes of limitations. Indeed, the language tracks the wording of the charge filing period in Title VII that has been recognized as establishing a statute of limitations (*Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* No. 76–99, decided June 20, 1977, slip op., pp. 15–16), subject to tolling for equitable considerations. See *Reeb* v. *Economic Opportunity Atlanta Inc.,* 516 F. 2d 924, 926–929 (C.A. 5) *Laffey* v. *Northwest Airlines, Inc.,* C.A.D.C., Nos. 74–1791, 75–1334, decided October 20, 1976, amended September 8, 1977. The 180-day time period of Section 7(d) was referred to in the legislative history as a "statute of limitations" and not as an absolute jurisdictional prerequisite to suit. Hearings on H.R. 3651, 3768, and 4221 (Age Discrimination in Employment) before the Gen-

eral Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., p. 63 (1967) (House ADEA Hearings). There is, accordingly, no basis for concluding that the "recogniz[ed] judicial power to toll such statutes" (*American Pipe & Construction Co.* v. *Utah, supra,* 414 U.S. at 558) does not apply.

C. As the court of appeals stated, "[t]his is not a case of a plaintiff sleeping on her rights nor a defendant who is in any way being prejudiced thereby either presumptively or in fact" (App. 36). Respondent moved within days to assert her rights under the Age Discrimination in Employment Act, and in turn the Department of Labor promptly moved to conciliate her claim. This case is therefore governed by this Court's decision in *Burnett, supra,* to toll the statute of limitations in circumstances where the employer "could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that [the employee] was actively pursuing his * * * remedy * * *" (380 U.S. at 430). In contrast to the situation in *Electrical Workers* v. *Robbins & Myers, Inc.,* 429 U.S. 229, where this Court refused to toll a Title VII claim while petitioner pursued a contract right, respondent here pursued an administrative remedy based upon the same statutory cause of action as the suit itself (29 U.S.C. 623(a)), and presented the same legal and factual questions for resolution. The Secretary's resulting conciliation efforts were performed under the mandate of the Age Discrimination Act, and were precisely what was

required by the provision upon which petitioner relies. Tolling was appropriate because the purposes of the time limitation have been satisfied and "the humanitarian purpose of the [Act] makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying the statute of limitations is served by doing so" (*Burnett, supra,* 380 U.S. at 434).

II

The court of appeals' decision is equally sustainable on the ground that the lodging of a timely complaint with the Department of Labor asserting the aggrieved person's rights under the Act satisfied the Section 7(d) notice requirement. Although Section 7(d) literally requires a "notice of an intent to file [a civil] action," this Court has looked beyond the words to the purpose of the Act "[w]hen [the plain] meaning has led to absurd or futile results." *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543. Here respondent's original complaint to the Secretary, while making no express reference to an intent to sue, invoked the employee's rights under the Act, and satisfied all the notice and conciliation goals of Section 7(d). The Act should not be interpreted to require forfeiture of statutory rights because of verbal variances in the employee's notice to the Secretary that cause no prejudice to any party in interest and that have no relation to any of the purposes of the Act. In a comparable context, this Court has declined to require literal compliance where the steps taken fulfilled the legislative objectives of the statu-

tory procedural provisions, and literal compliance "would serve no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman,* 404 U.S. 522, 526. The Court's analysis in *Love* v. *Pullman* is equally compelling in the context of the Age Discrimination in Employment Act, which depends to an even greater extent upon private enforcement to achieve its goals, and where as in *Love* "laymen, unassisted by [private] lawyers initiate the process." 404 U.S. at 527. A strictly literal construction of Section 7(d) should be rejected, and the lodging with the Secretary of Labor of a complaint that is sufficient to initiate the Secretary's conciliation efforts should be held to satisfy the statutory notice requirement.

I

ARGUMENT

THE 180-DAY REQUIREMENT FOR NOTICE OF INTENT TO SUE IS SUBJECT TO EQUITABLE TOLLING AT LEAST WHERE SUBSTANTIAL COMPLIANCE WITH CONGRESSIONAL INTENT IS ACHIEVED BY THE TIMELY FILING OF A DISCRIMINATION CLAIM WITH THE SECRETARY OF LABOR

The Age Discrimination in Employment Act was adopted in 1967 as an extension of the policy against employment discrimination embodied in Title VII of the Civil Rights Act of 1964 (78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq.*).[9] S. Rep. No. 723, 90th Cong., 1st Sess., pp. 1–2 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., pp. 1–2 (1967). The prohibitory provisions of the ADEA are for the

[9] See Title VII, Section 715, 42 U.S.C. ~~(Supp. V.)~~ 2000e–14. See also 110 Cong. Rec. 2596–2599, 9911–9913, 13490–13492 (1964).

most part identical with those of Title VII except that "age" has been substituted for "race, color, religion, sex, or national origin". See *Hodgson* v. *First Federal Savings and Loan Ass'n,* 455 F. 2d 818, 820 (C.A. 5).

With respect to enforcement, however, the congressional authors of the ADEA departed significantly from the pattern of Title VII. The original "Administration bill," which borrowed enforcement provisions from both Title VII and the National Labor Relations Act,[10] met with substantial opposition from legislators who feared that the establishment of another special bureaucracy would produce "the same delays which plague * * * the EEOC and the NLRB." 113 Cong. Rec. 7076 (1976) Senator Javits, the principal sponsor of the age discrimination legislation (S. Rep. No. 723, *supra,* at p. 13), characterized these procedural stumbling blocks as "always unfortunate, but * * * particularly so in the case of older citizens to whom, by definition, relatively few pro-

[10] Under that bill, the Secretary—like the Equal Employment Opportunity Commission (EEOC) under Title VII—would investigate a charge of discrimination, determine reasonable cause to proceed, and seek voluntary elimination of any unlawful practices. Compare S. 830, § 7(a), 90th Cong., 1st Sess., 113 Cong. Rec. 2795 (1967) with 42 U.S.C. 2000e–5(a). The EEOC had no enforcement powers of its own at the time, and could only issue a right-to-sue letter to the claimant or, in certain cases, recommend suit to the Attorney General. 42 U.S.C. 2000e–5(e). The Administration's age bill gave the Secretary independent enforcement powers like those of the National Labor Relations Act (49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.*) and thus did not provide for enforcement by private lawsuit. Compare S. 830, § 7(b), 90th Cong., 1st Sess., 113 Cong. Rec. 2795 (1967) with 29 U.S.C. 160.

ductive years are left." (113 Cong. Rec. 7076 (1967)).[11] Senator Javits proposed to follow instead the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*), which relies for enforcement exclusively on court suits brought by aggrieved individuals or the Secretary of Labor. See S. 788, 90th Cong., 1st Sess., 113 Cong. Rec. 2199–2200 (1967); S. Amendment Nos. 125, 126, 113 Cong. Rec. 7077 (1967). "By utilizing the courts [directly] * * * as the forum to hear cases arising under the law," it was hoped that the problem of procedural roadblocks would be "largely avoided." 113 Cong. Rec. 7076 (1967).[12]

The enforcement provisions that were adopted as a result of Senator Javits's efforts are designed to simplify procedures for the new class of discrimination complainants, and relieve them from procedural impediments that had burdened race and sex claimants under Title VII. The Act omitted many of the administrative steps interposed by Title VII before the private complainant could file suit, including the

[11] See also Hearings on S. 830, S. 788 (Discrimination in Employment) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., p. 24 (1967) (Senate ADEA Hearings).

[12] As reported out, the nearly identical Senate and House bills both adopted the enforcement scheme suggested by Senator Javits. See S. 830, § 7, 90th Cong., 1st Sess., 113 Cong. Rec. 31248–31249 (1967); H.R. 13054, § 7, 90th Cong., 1st Sess., 113 Cong. Rec. 34739 (1967). Senator Yarborough, who sponsored and managed S. 830 for the Administration (113 Cong. Rec. 2467, 31252 (1967)), referred to the enforcement provisions as "amendments offered in the Committee by the distinguished senior Senator from New York [*i.e.*, Senator Javits], which were adopted and made a part of the Senate bill." 113 Cong. Rec. 35055 (1967).

agency's determination of reasonable cause after investigation (42 U.S.C. 2000e–5(a)) and its issuance of a right-to-sue letter after attempted conciliation (42 U.S.C. 2000e–5(e)).[13] Nevertheless, the conciliation role of the enforcement agency was retained and the Act established procedures designed to provide an opportunity for the Department of Labor to attempt to resolve age discrimination complaints by informal methods. Thus, before either a private enforcement action or an action by the Secretary may be brought,[14]

[13] The requirements of Title VII that the initial submission to the agency be "in writing" and "under oath" were omitted (see 42 U.S.C. 2000e–5(a)). The period for submission was extended from 90 to 180 days of the occurrence of the discrimination, as under Title VII at that time (see 42 U.S.C. 2000e–5(d)). Omitted was any provision restricting private suits to the period within 30 days of receiving notice from the agency that its administrative efforts had been completed (see 42 U.S.C. 2000e–5(e)).

The Act also relaxed the Title VII requirement that an aggrieved individual must initiate proceedings with an appropriate state or local government agency 60 days *before filing a charge* with the EEOC (42 U.S.C. 2000e–5(b). It was modified to require that proceedings pending in an appropriate state agency be permitted to run 60 days *before filing a lawsuit* under the federal Act (29 U.S.C. 633(b)). The legislative history explicitly shows that this change was made to permit "concurrent" (rather than consecutive) federal and state administrative proceedings under the ADEA. S. Rep. No. 723, 90th Cong., 1st Sess., p. 6 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., p. 6 (1967).

[14] The statutory cause of action is based on making it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a). The Secretary of Labor is empowered to bring suit in federal district court for appropriate relief. 29 U.S.C. 626(b). The ADEA also provides for private actions by "[a]ny person aggrieved" by age discrimination in employment. 29 U.S.C. 626(c).

the Secretary is required to attempt to eliminate any unlawful practice "by informal methods of conciliation, conference and persuasion." 29 U.S.C. 626(b) and (d). In order to enable the Secretary to carry out his responsibilities prior to the filing of any private suit, the Act requires the person alleging age discrimination to afford the Secretary at least 60 days' "notice of intent to sue." 29 U.S.C. 626(d). The Act provides that the notice "shall be filed * * * within one hundred and eighty days after the alleged unlawful practice occurred."[15] 29 U.S.C. 626(d)(1). Lodging a claim of discrimination (not specifically referring to intent to sue) with the Secretary of Labor triggers an identical conciliation responsibility under 29 U.S.C. 626(b) as well as the possibility of suit by the Secretary. A limit of two years from the date of the alleged violation is provided for the actual filing of any suit, after which "every such action shall be forever barred."[16] 29 U.S.C. 626(e) and 255(a).

Petitioner's primary contention is that Congress intended to terminate the rights of elderly workers for late filing of their formal notices of intent to sue without regard to whether the actions taken by employees in lodging their claims or by the Secretary of Labor in attempting conciliation fulfilled the purposes of the Section 7(d) notice requirement. While

[15] Where the alleged discrimination occurs in a state having its own age discrimination-in-employment law and enforcement agency (which is not the case here), the period is 300 days. 29 U.S.C. 626(d)(2) and 633(b).

[16] The period is extended to three years in the case of "willful" violations. 29 U.S.C. 255(a).

the filing of a notice with the Secretary is doubtless a condition precedent to the bringing of an action, it does not follow that Congress intended the designated 180-day period to constitute an inflexible limit that cannot be tolled under equitable principles generally applicable to statutes of limitations. As we show below, where the purposes of the notice requirement have been fulfilled in a timely fashion, nothing in the language, history, or policies of Section 7(d) should preclude an equitable tolling designed to advance the fundamental remedial purposes of the statute.

A. TOLLING AFTER A CLAIM HAS TIMELY BEEN LODGED WITH AND ACTED UPON BY THE SECRETARY OF LABOR IS FULLY CONSISTENT WITH THE LEGISLATIVE INTENT TO PROVIDE THE SECRETARY, AND THROUGH HIM THE EMPLOYER, WITH NOTICE OF POTENTIAL LITIGATION BEFORE THE POSSIBILITY OF CONCILIATION HAS BEEN INHIBITED BY THE PASSAGE OF TIME AND THE ACCUMULATION OF BACK PAY CLAIMS

In determining whether tolling is permissible, "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 557–558. The tolling determination requires reference to the "purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Burnett* v. *New York Central Railroad Co.,* 380 U.S. 424, 427.

The precise purpose of the Section 7(d) notice requirement is specified in the legislative history and emphasized by its function in the statutory framework. The legislative reports accompanying Section 7(d) state that the purpose of mandating notice to the Secretary before filing suit was "to allow time for the Secretary to mediate the grievance." S. Rep. No. 723, 90th Cong. 1st Sess., p. 5 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., p 5 (1967) The statutory framework also reflects that goal; notice triggers the Secretary's statutory responsibility to "promptly notify all persons named therein as prospective defendants in the action and * * * promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."[17] 29 U.S.C. 626(d). The 180-day time limitation assures that the Secretary will be able to undertake the prescribed mediation efforts before voluntary settlement is inhibited by the hardening of positions and by the accumulation of large claims for back pay. No other action is required in consequence of the prescribed notice to the Secretary and, however ineptly the grievant's notice is worded, no prejudice results so long as the persons charged are notified of the claim asserted and the Secretary undertakes the requisite efforts to bring about voluntary settlement.

[17] Compare the purposes of the corresponding provision in Title VII (42 U.S.C. 2000e-5(b)), of which the courts have said: "First, it notifies the charged party of the asserted violation. Secondly, it * * * permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law." *Williams* v. *General Foods Corp.*, 492 F. 2d 399, 404 (C.A. 7); *Equal Employment Opportunity Commission* v. *MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1092 (C.A. 6); *Evans* v. *Sheraton Park Hotel*, 503 F. 2d 177, 183 (C.A. D.C); *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F. 2d 678, 687 (C.A. 5).

The statutory objectives of Section 7(d) were fully satisfied here by the prompt filing of a claim with the Secretary of Labor within nine days of the alleged discrimination. Immediately upon the grievant's assertion of rights under the Act, the Department notified petitioner of the nature of the claim and promptly initiated a process of informal conciliation, conference, and persuasion, in which the employer participated to the point of impasse. Petitioner (Br. 54) and the amicus Equal Employment Advisory Council (Br. 23) mistakenly claim that the Secretary's conciliation efforts would have been more intensive if a formal notice of intent to sue had been filed. The statutory duty of the Secretary to conciliate after the filing of a complaint (29 US.C. 626(b))[18] and after a notice of intent to sue (29 U.S.C. 626(d)) is identical. The Secretary sought again to conciliate after the filing of the formal notice of intent to sue (see App. 55) only out of scrupulous regard for the technical requirements of Section 7(d); the nature of the second conciliation effort was exactly the same as that initiated by respondent's original complaint. No further significant benefit would have accrued to the employer, the Secretary, or the public, had the original complaint to the Secre-

[18] 29 U.S.C. 626(b) states in pertinent part: "* * * [T]he Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

tary been more artfully formulated to indicate explicitly an intent to sue. The Secretary had full opportunity to carry out his conciliation responsibilities under the Act, and the employer had full and timely notice of what he needed to know in the event that settlement out of court should fail.

Petitioner asserts (Br. 27) that its settlement posture would have been different if it were "faced with definite notice of a threatened lawsuit" (see also Amicus Br. 21). But the filing of an intent-to-sue notice does not indicate that suit will definitely be filed upon the failure of conciliation. Nothing in the statute requires a person filing such a notice to sue imminently or to file suit at all. See 29 U.S.C. 626. Moreover, petitioner cannot claim that it conducted its conciliation negotiations on the assumption that there would be no litigation. As petitioner recognizes (Br. 50), ADEA enforcement suits can be brought by the Secretary without regard to whether the aggrieved individual has filed a "notice of intent to sue." An employer engaged in conciliation negotiations with the Secretary must anticipate the possibility of litigation if the conciliation efforts should fail, whether or not the individual complainant may sue.

These considerations show that the purposes of Section 7(d) were fully satisfied by the procedures followed in this case. In these circumstances, a refusal to apply traditional tolling principles would improperly frustrate the statutory purpose, especially since Congress' very choice of the phrase "notice of intent to sue" appears to have been merely an attempt to em-

phasize the contrast between Title VII—which in 1967 was construed to require agency action as a precondition to private suit—and the ADEA procedure permitting the filing of private suit independent of agency action.[19] There is nothing in the legislative history that suggests any congressional interest in assuring express reference to possible lawsuit in the notice to the Secretary. Instead the history shows that Congress intended to relax the procedural requirements which had led to frustration of rights and excessive delays in the enforcement

[19] The substitution of "notice of intent to sue" for "charge" simply recognizes that under the ADEA, the complainant is free to bring suit at the pescribed time without further action by the government agency. While the instant legislation was under consideration by Congress, several district courts held that exhaustion of administrative proceedings was a prerequisite to a private action under Title VII. *E.g.*: *Dent* v. *St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56 (ND Ala); *Choate* v *Caterpillar Tractor Co.* 274 F. Supp. 776 (S.D. Ill.)—both reversed after the enactment of the ADEA, 406 F 2d 399 (C.A. 5) and 402 F. 2d 357 (C.A. 7). The Senate Committee was specifically made aware of this impediment to prompt relief in the courts, as a result of its contemporaneous consideration of proposed legislation to improve enforcement of Title VII. See, *e.g.*, testimony of Jack Greenberg (Counsel to the NAACP Legal Defense Fund) that many Title VII "cases [were] hung up on such technical-procedural questions as exhaustion of administrative remedies," citing *Dent*, *supra*. Hearings on S. 1308, S. 1667 (Equal Employment Opportunity) before the Subcommittee on Employment, Manpower and Poverty of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., pp. 109, 111 (1967). The phrase "notice of intent to sue" in the ADEA was thus chosen to contrast with the "Notice of Right to Sue" letter issued by the EEOC upon completion of its administrative proceedings. See 29 CFR 1601.25 in 30 Fed. Reg. 8407).

of Title VII (*see supra*, pp. 15–18).[20] This is, accordingly, a case in which the "congressional purpose is effectuated by tolling the statute of limitations" (*Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 427).

B. THE LANGUAGE AND HISTORY OF THE ACT PROVIDE NO INDICATION THAT CONGRESS INTENDED TO PRECLUDE ABSOLUTELY THE CLAIMS OF ELDERLY EMPLOYEES WHOSE NOTICES FAILED TO MEET THE TIME REQUIREMENTS OF SECTION 7(d)

Petitioner argues (Br. 30–35) that the 180-day requirement is a jurisdictional prerequisite to suit rather than a statute of limitations and that Congress intended that failure to meet the 180-day time limitation would constitute an absolute bar to vindication of age discrimination claims. A comparison of the language used in the notice provision of Section 7(d) with the wording of the time limitation undermines petitioner's argument. The requirement that notice

[20] That relaxation, rather than tightening, of the requirements was the intention is confirmed by the fact that the language in question first appeared, not in a source reflecting employer interest, but in an amendment proposed by the American Federation of Labor (AFL–CIO), which provided in part that "[b]efore instituting any action to enforce this Act * * *, an employee shall appropriately notify the Secretary of his intention to bring such an action * * *." See Senate ADEA Hearings, *supra*, at p. 101. The amendment was "primarily concerned" with adapting the procedures of the FLSA, as suggested by Senator Javits (see *supra*, p. 16), in order to utilize "individual suits" and "injunction proceedings" to enforce the Act. See Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 (Age Discrimination in Employment) before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., pp. 420–421 (1967).

be given prior to suit is couched in absolute terms. "No civil action may be commenced * * * until the individual has given * * * notice * * *." 29 U.S.C. 626(d). By contrast the timing requirement simply states, in the familiar terminology of statutes of limitations, that notice "shall be filed * * * within one hundred eighty days after the alleged unlawful practice occurred." 29 U.S.C. 626(d)(1). Indeed, the language chosen by Congress to establish the time requirement follows closely the language establishing the charge filing period in Title VII, language that the Court has previously characterized as a statute of limitations. *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission*, No. 76–99, decided June 20, 1977, slip op., pp. 15–16.[21] Moreover, as the court of appeals pointed out (App. 20), there is substantial precedent for allowing equitable coniderations to toll the 180-day charging requirement of Title VII.[22]

Nothing in the language of Section 7(d) suggests that Congress intended that failure to meet the time requirement would terminate a complainant's rights.

[21] Both Title VII (Section 706f(1)) and the ADEA (Section 7(e)) also have a time limit upon filing a suit in court, emphasizing that there are two forums for enforcement, each with its own statutory time limitation.

[22] See, *e.g.*, *Laffey* v. *Northwest Airlines*, C.A. D.C., Nos. 74–1791 and 75–1334, decided October 20, 1976, amended September 8, 1977; *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 926–29 (C.A. 5); contra, *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1314–1316 (C.A. 8).

Indeed, the chosen language also contrasts sharply with the wording of the overall two-year period for filing suit in the very next paragraph, Section 7(e),[23] which reads "* * * every such action *shall be forever barred unless* commenced within two years after the cause of action accrued * * *" (29 U.S.C. 255(a); emphasis added). Yet even that provision has consistently been held not to be an absolute cut-off of the right to sue (*Hodgson* v. *Humphries,* 454 F. 2d 1279, 1283–1284 (C.A. 10); *Mumbower* v. *Callicott,* 526 F. 2d 1183, 1187 n. 5 (C.A. 8)), and therefore to be subject to tolling under traditional principles (*Ott* v. *Midland-Ross Corp.,* 523 F. 2d 1367, 1370 (C.A. 6); and see *Bingham* v. *Advance Industrial Security, Inc.,* 138 Ga. App. 875, 228 S.E. 2d 1). There is no apparent reason why Congress should have intended the initial 180-day period for filing notice with the Secretary to be more inflexible than the overall two-year period for actually filing the action.

The legislative history of the 180-day period is likewise devoid of any indication that the proposed time period would serve as an absolute cut-off of rights rather than as a typical time limitation. The time period was referred to as a "statute of limitations," both when it was first proposed by an industry spokesman and when it was subsequently added to

[23] Section 7(e) of the ADEA incorporates by reference Section 6 of the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 21 *et seq.*

the bill in committee.[24] And there was no suggestion in any form that the "recogniz[ed] judicial power to toll [such] statutes" (*American Pipe & Construction Co.* v. *Utah, supra,* 414 U.S. at 558) would not apply.

No plausible congressional purpose would be served by reading the time limit as creating an inflexible cut-off of the right to sue when the Secretary has in fact accepted the complainant's notification of the claim and, after promptly advising the person charged, has fully performed the prescribed mediation function within the time provided. To forfeit the complainant's right to sue in such circumstances, because of a formal defect in the original notification and lateness of the corrective notice, would be to disregard the fact that time limits are "primarily designed to assure fairness to defendants" (*Burnett* v. *New York Central Railroad Co., supra,* 380 U.S. at 428). It would, moreover, contravene the settled doctrine that the "policy of repose" which underlies time limits does not

[24] A representative of the U.S. Chamber of Commerce proposed that "[a] short statute of limitations should be adopted" similar to that in Title VII, "[l]imiting the time for making claims" (House ADEA Hearings, *supra,* at p. 63). The minutes of the Senate Committee on Labor and Public Welfare states, in pertinent part:

"Senator Javits offered an amendment to Page 11, Line 24, relating to the statute of limitations. Without objection, the amendment was agreed to." [Minutes, November 1, 1967, p. 7.]

Senator Javits' amendment was in terms identical to paragraphs (1) and (2) in Section 7(d) of the ADEA as enacted (29 U.S.C. 626(d)(1), (2)).

require forfeiture of rights where its objectives are "outweighed [by] the interests of justice" (380 U.S. at 428). Finally, it would be inconsistent with the remedial and humanitarian nature of the statute and the principle of statutory construction that requires such statutes to be liberally interpreted in effectuation of the legislative purpose (App. 32). "The Act should not be construed to make it a trap for the unwary, nor should it require every claimant to retain counsel experienced in the technicalities of age discrimination litigation." *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247, 251 (C.A. 6) (McCree, J., dissenting), Cf. *Burnett* v. *New York Central Railroad Co., supra,* 380 U.S. at 427–428.

Petitioner characterizes the notice provision as "jurisdictional," but as the Courts of Appeals for the Fifth, and Tenth Circuits both have noted, this usage reflects a "conceptual confusion" in failing to distinguish between, on the one hand, procedural requirements which may not be waived but whose time limits are nevertheless subject to equitable tolling and, on the other hand, absolute requirements which are *sine qua non* to the courts' exercising any powers at all (App. 32–33; *Reeb* v. *Economic Opportunity, Atlanta Inc.*, 516 F. 2d 924, 928 (C.A. 5)). For example, in *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (C.A. 5), on which petitioner relies, the court used the term "jurisdictional," but the same court twice thereafter made it clear that that characterization in *Powell* did not imply absence of power

to toll the time limit. *Charlier* v. *S. C. Johnson & Son, Inc.*, 556 F. 2d 761 (C.A. 5); *Edwards* v. *Kaiser Aluminum and Aluminum Sales, Inc.*, 515 F. 2d 1195 (C.A. 5).[25] Likewise, the Fifth Circuit has made it clear with respect to time limits on filng a charge under Title VII (42 U.S.C. 2000e–5(e)) that its characterization of time limits as "jurisdictional" in prior decisions did not imply the unavailability of judical relief by equitable tolling (*Reeb* v. *Economic Opportunity Atlanta Inc.*, supra, 516 F. 2d. at 928):

> The *ratio decidendi* * * * of the leading cases dealing with timing requirements in general under the Act [Title VII] compels the conclusion that the ninety day requirement [amended in 1972 to 180 days] is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view

[25] Similarly, the Third Circuit, in ruling that Section 14(b) of the ADEA, 29 U.S.C. 633(b), requires prior resort to state procedures as a "jurisdictional" prerequisite to private suits under the Act, has in the same breath excused noncompliance with that requirement on "equitable grounds." *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834, 844 (C.A. 3), petition for certiorari filed (April 20, 1977, No. 76–1451); *Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d 13, 17 (C.A. 3). Contrary to petitioner's contention (Br. 32), the Court of Appeals for the Eight Circuit left open the question whether technical satisfaction of the notice requirement was an absolute prerequisite to suit. *Moses* v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 94 (C.A. 8). But cf. *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247 (C.A. 6), and see *id.* at 251 (McCree, J., dissenting).

> that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.[26]

That analysis is equally compelling as to the requirement in Section 7(d) of the ADEA that "notice shall be filed * * * within one hundred and eighty days." In the absence of either statutory language or legislative history suggesting that the failure to meet the time limitation absolutely forfeits the age discrimination claim, the court of appeals correctly held "that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel" (App. 33).

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[26] This analysis is also applicable to the broad use of the term "jurisdictional" by this Court in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240. The decision in *Robbins & Myers* did not turn on whether the time limit in question was an absolute barrier and therefore not tollable in any circumstances. The Court decided only that the claimant's resort to grievance procedures was not a sufficient basis for tolling the statutory time limit, since those procedures did not relate to the statutory claim at bar, but to "an independent claim based on a *contract* right" which rested on different underlying policies (429 U.S. at 238; emphasis in original). Likewise in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, which *Robbins & Myers* cites in this regard, there was no occasion to consider whether the time limit was absolute and could not be tolled. The filing in that case had in fact been timely, and the Court's reference to "jurisdictional requirements" was made in connection with its conclusion that all of the statutory requirements had been met (415 U.S. at 47). Finally, as the *Robbins & Myers* opinion itself makes clear (429 U.S. at 237–238), there was no intent to modify the principles expressed in *Burnett*, *supra*, as to the availability of tolling on equitable grounds.

C. IN THIS CASE, RESPONDENT'S CONSCIENTIOUS EFFORTS TO ESTABLISH HER CLAIM MADE TOLLING APPROPRIATE DURING THE TIME WITHIN WHICH RESPONDENT PURSUED AN IDENTICAL CAUSE OF ACTION BASED UPON IDENTICAL FACTS IN THE ALTERNATIVE ADMINISTRATIVE FORUM PROVIDED BY THE ACT

This is not the case of a claimant who has "slept on [her] rights" (*Burnett*, *supra*, 380 U.S. at 429). The instant claimant moved within days of the alleged discrimination to assert her claims under the Act. She sought legal counsel almost immediately after the discharge and promptly notified the Department of Labor of her claim. During the ensuing period of conferences between the Department and petitioner, respondent made repeated telephone inquiries as to the progress of the case. Finally, when on the 217th day after the discharge she was notified by the Department that she was entitled to file private suit, she immediately turned to private counsel again. Within nine days of the Department's notification she had filed a notice of intention to sue as prescribed by Section 7(d), correct as to form and content, but delayed, without fault on her part, 46 days beyond the 180-day period specified in the section. The court of appeals summarized the situation correctly, when it concluded (App. 36):

> We cannot fault [respondent] in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time

> would void her cause. This is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of [respondent's] notice of intent to sue.

This Court's decisions in *Burnett* and *Robbins & Myers* support the decision of the court of appeals. In *Burnett,* the plaintiff asserted a claim under the Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U.S.C. 51 *et seq.*) in a state court, which had concurrent jurisdiction over such claims with the federal courts. The state court suit was dismissed because of improper venue and plaintiff thereafter filed a new complaint in the United States District Court. This Court held that the state court filing tolled the applicable limitations period, stating (380 U.S. at 429–430):

> Petitioner here did not sleep on his rights but brought an action * * *. Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy * * *.

In *Robbins & Myers* the question was whether the time period for filing charges with the EEOC under Title VII was tolled while complainant pursued grievance proceedings under a collective bargaining

agreement.[27] Although declining to permit tolling in those circumstances, the Court expressed no doubt as to the general tolling doctrine. *Burnett* was distinguished on the ground that there the plaintiff had been asserting "the same statutory claim" in the State proceedings as in the federal action at bar (429 U.S. at 238). In contrast, the Court noted, the plaintiff in *Robbins & Myers* had been "asserting an independent claim based on a *contract* right" (*ibid.*, emphasis in original).

> Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII * * *. The grievance process assures no such comparable notice. * * * Even if racial discrimination is explicitly discussed, * * * the grievance procedure properly involves only *contractual* questions, and would but fortuitously implicate the Title VII standards. [429 U.S. at 240–241, n. 14; emphasis in original.][28]

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[27] The plaintiff in *Robbins & Myers* had filed a charge of racial discrimination with the EEOC 84 days after completion of the grievance steps provided for in the collective-bargaining agreement but 108 days after the date of her discharge (429 U.S. at 232).

At the time of the discharge complained of, Section 706(d) in Title VII, 42 U.S.C. 2000e–5(d), provided that "[a] charge under subsection (a) of this section shall be filed within [90] days after the alleged unlawful employment practice occurred." The 1972 amendments to Title VII extended this limitations period from 90 days to 180 days. At the same time, Section 706(d) was renumbered as Section 706(e), Equal Employment Opportunity Act of 1972, 86 Stat. 105, as amended, 42 U.S.C. (Supp. V) 2000e–5(e).

[28] See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, where this Court held that the timely filing of a charge with the

In the instant case, unlike *Robbins & Myers,* the proceedings prior to the filing of suit fulfilled the policies of the applicable notice requirement and of its time limit. Here, the plaintiff's invocation of the Secretary's aid was based on the same cause of action as the suit itself (see 29 U.S.C. 623(a)), and presented the same legal and factual issues for resolution. The Secretary's resulting mediation activities were performed under the mandate of the very statute under which the suit was brought, and were precisely what was required by the provision on which petitioner relies. See 29 U.S.C. 626(d). Accordingly, the employer was from the beginning fully apprised of what it would have to defend against if failure of the statutory mediation procedures should lead to litigation. This is preciseiy the situation for application of the teachings of *Burnett* since the purpose of the time limitations to prevent the litigation of "stale claims" has been satisfied and "the humanitarian purpose of the [Act] makes clear that Congress would not wish a plaintiff deprived of his rights when no

EEOC pursuant to Section 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, under 42 U.S.C. 1981. In reaching that conclusion, this Court emphasized (421 U.S. at 467; footnote omitted):

> [P]erhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.

policy underlying the statute of limitations is served in doing so" (380 U.S. at 434).[29]

II.

THE NOTICE REQUIREMENT IN SECTION 7(d) OF THE ACT IS SATISFIED WHEN AN AGGRIEVED PERSON LODGES A TIMELY COMPLAINT OF AGE DISCRIMINATION IN EMPLOYMENT, ASSERTING HIS RIGHTS UNDER THE ACT AND THE SECRETARY OF LABOR PROMPTLY NOTIFIES THE EMPLOYER, EVEN IF THE COMPLAINT DOES NOT EXPLICITLY REFER TO AN INTENT TO FILE PRIVATE SUIT

While the court of appeals properly held that the 180-day time limit in Section 7(d) of the Act was subject to tolling and was in fact tolled, its decision is equally sustainable on the ground that respondent's original communication was sufficient to satisfy the Section 7(d) requirement.[30]

The rejection of the adequacy of respondent's initial communication to the Secretary by the courts below (see App. 18, 29) was based on a literal reading of Section 7(d), which speaks of a "notice of intent to file [a civil] action." 29 U.S.C. 626(d). But, "[w]hen

[29] See also *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 552–553.

[30] Out of an abundance of caution Mr. Speer, the Assistant Area Director of the Department's Wage and Hour Division, notified Ms. Dartt that "[t]he fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit" (App. 69). The same precautionary effort to adhere strictly to a literal reading of the Act's procedural requirements caused Speer to reinitiate conciliation upon receipt of the formal notice of intent to sue, even though the Labor Department had already satisfied its responsibility to conciliate under the identical statutory mandate of Section 7(b). It is our contention, however, that Ms. Dartt's action in lodging a complaint with the Secretary satisfied the requirements of Section 7(d).

[the plain] meaning has led to absurd or futile results, * * * this Court has looked beyond the words to the purpose of the Act" and "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543 (footnotes omitted); and see *Perry* v. *Commerce Loan Co.,* 383 U.S. 392, 400.

Adherence to a strictly literal reading of the instant provision would lead to just such unjustified results, requiring the forfeiture of statutory rights because of verbal variances in the employee's notice to the Secretary that cause no prejudice to any party in interest and that have no relation to any of the purposes of the Act. Admittedly, respondent's original communication to the Secretary here made no express reference to "an intent to file [civil] action." But as appears from the discussion in point I, *supra,* pp. 20–22, it satisfied all of the objectives of Section 7(d), since it invoked the employee's rights under the Act, afforded the Secretary an early opportunity to undertake the conciliation measures directed by the Section (which he promptly did), and resulted in the almost immediate notification of the employer of everything it needed to know to protect its interests. An explicit statement to the Secretary of an intention to file suit would have added nothing of practical consequence to either the employer or the public.[31]

[31] Petitioner objects that Dartt's complaint to the Department was made in person and not by written communication (Br. 20–21). But that fact in no way affected the notice and conciliation objectives of Section 7(d), since the Department accepted the oral complaint, notified the employer, and initiated the conciliation efforts contemplated by the section. While the Department could have rejected the oral representations and required a written formal document (see *Hays* v. *Republic Steel Corp.,* 531 F. 2d 1307, 1312 (C.A. 5)), it did not do so. Obviously, no prejudice to the employer accrued from the fact that the original complaint was not in writing. Moreover, Section 7(d) contains no requirement that any document be submitted. In this it conspicuously departs from the pre-existing corresponding provision of Title VII which required a "charge[ ] in writing under oath" (Section 706(a), 42 U.S.C. 2000e–5(a); now Section 706(b), 42 U.S.C. (Supp. V) 2000e–5(b)). See, *e.g.*, *Sutherland* v. *SKF Indus., Inc.,* 419 F. Supp. 610, 615–617 (E.D. Pa.); *Smith* v. *Jos. Schlitz Brewing Co.,* 419 F. Supp. 770, 774–776 (D. N.J.); *Cowlishaw* v. *Armstrong Rubber Co.,* 425 F. Supp. 802, 807 (E.D. N.Y.).

To require a lay grievant to formulate his complaint in the precise terms of the statute or with a degree of explicitness unnecessary to the statutory purposes would be to elevate form over substance. In a comparable context under Title VII, this Court declined, in *Love* v. *Pullman Co.,* 404 U.S. 522, to require literal compliance where the steps taken fulfilled the legislative objectives of those provisions. There the complainant failed to commence proceedings initially in the appropriate state agency as required by the literal terms of Title VII (42 U.S.C. 2000e–5(b), (d)), but the EEOC had "orally advised" the State authorities that it had received the claimant's charge (404 U.S. at 524). This Court held that the oral advice by the agency was sufficient to satisfy the requirements of the statute because it fulfilled the legislative purpose by initiating state proceedings

and assuring expeditious handling of the claim (404 U.S. at 525). Here also, by initiating conciliation efforts by the Secretary and assuring prompt notice to the employer, the procedures followed fully satisfied the legislative purposes of Section 7(d), notwithstanding their nonprejudicial variance from the literal terms of the statute. See pages 20–22 *supra*. To require literal compliance in these circumstances "would serve no purpose other than the creation of an additional procedural technicality" (404 U.S. at 526).

"Such technicalities," the Court recognized in *Love*, "are particularly inappropriate in a statutory scheme [there, Title VII] in which laymen, unassisted by trained lawyers, initiate the process" (404 U.S. at 527). The ADEA complainant is hardly likely to have engaged private counsel at the point where he first communicates with the Secretary. Many aggrieved persons (as in the instant case) will not even know that they have a private right of action. And for those that do, there may well not be sufficient occasion, before the Secretary investigates, to decide whether to exercise it.

It is highly unlikely that Congress would have intended to limit the right of private action to those persons astute enough, or litigious enough, to have consulted counsel, or to have decided upon private action without such consultation, before applying to the Secretary for help. On the contrary, the Act's emphasis on the resolution of claims by "informal methods of conciliation, conference, and persuasion"

(Section 7(b), (d)) emphasizes the congressional assumption that the decision to resort to litigation ordinarily would not be made until and unless those methods failed to achieve settlement. Since the Act relies in great part on claims initiated by the victims of discrimination to rectify violations of its provisions (see *supra*, p. 4 and n. 3), the effectuation of its objectives would be substantially undermined by a construction requiring the victim of discrimination to make a difficult choice of enforcement alternatives, normally requiring resort to legal advice, before he can invoke the Secretary's mediation efforts and bring the Act's enforcement machinery into play.

Moreover, the legislative history discussed *supra*, pp. 14–18 and nn. 18, 19, shows that relaxation of the procedural requirements that had hindered effectuation of Title VII was a primary consideration in the decision to depart from the enforcement provisions of that statute. The decision below, however, would make the ADEA's notice requirement more stringent and formalistic than its counterpart in Title VII.[33]

Since the literal construction of Section 7(d) for which petitioner contends leads to so self-defeating a result, it should not be adopted. Nothing in the legis-

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[33] It is established under Title VII that a defective but otherwise timely charge may be cured by amendments which relate back to the original filing date, so long as the original charge contained enough information to effectuate the purposes of the charging requirement (see n. 17, *supra*, p. 20). See, *e.g.*, *Georgia Power Company* v. *Equal Employment Opportunity Commission*, 412 F. 2d 462 (C.A. 5); *Blue Bell Boots, Inc.* v. *Equal Employment Opportunity Commission*, 418 F. 2d 355 (C.A. 6).

lative history or the statutory purpose requires that construction or even supports it, and its rejection would not prejudice the petitioner in any way. "[T]he fair interpretation of a statute," this Court has said, "is often 'the art of proliferating a purpose,' * * * revealed more by the demonstrable forces that produced it than by its precise phrasing." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 489. The judgment of the court of appeals was therefore correct, even apart from the ground adopted by that court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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